Supreme Court, U. S.
FILED
OCT 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE & RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEARD & KULTGEN
DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-2830

INDEX

Introductory Paragraph	1
Opinions Below	1
Jurisdiction	2
Question Raised	2
Statutory Provision Involved	3
Statement	3
Federal Jurisdiction	5
Reasons for Granting Writ of Certiorari	5
Conclusion	9
Proof of Service	9
Appendix A	A1

Authorities

CASES

Reines Distribution v. Admiral Corp. 256 F.Supp. 581 (SDNY, 1966)	7

STATUTES

Federal Statutes:

Clayton Act, Section 2(a)	3
15 U.S.C., Section 15	5
28 U.S.C., Section 1254(1)	2

RULES

Supreme Court Rule, Rule 19(1)(b)	8

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

SECURITY TIRE & RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTORY PARAGRAPH

The Petitioner, Security Tire & Rubber Company, a Virginia corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on the 12th day of July, 1979.

OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix page A1 infra) was entered on the 12th day of July, 1979. No petition for rehearing was filed. A Motion to Clarify Judgment was filed in the Court of Appeals by Respondent. This Motion was denied on August 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION RAISED

Petitioner (hereinafter called "Security") was a private brand vendor of tires, i.e. it purchased tires manufactured by others under the "Security" label for resale. During the relevant period, most of the tires which it thus purchased and resold were made for it by Respondent (hereinafter called "Gates"). Gates also marketed tires under the "Gates" label. It also made tires under the label "National" which were marketed by its wholly owned corporate subsidiary, National Tires, Inc. (hereinafter called "National"). In this suit, Security has alleged that at the relevant times it competed with National; that the tires manufactured by Gates for Security under the Security label and those manufactured for National under the National label were identical except for label; that the prices charged by Gates to National for National tires were less than those which it charged Security for identical tires made under the Security label; and that this price differential constituted price discrimination under the Robinson-Patman Act. The question presented here is whether the transactions in which the tires made by Gates under the National label were transferred to National constituted sales for the purposes of the Robinson-Patman Act.

STATUTORY PROVISION INVOLVED

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act reads (in pertinent part) as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce. . ."

STATEMENT

The District Court entered judgment for Security against Gates for treble damages on a jury verdict that Gates had discriminated in price between National and Security in the sale of tires to both. Since the question presented is whether the transactions in which Gates tires were transferred to National were sales within the meaning of the Robinson-Patman Act, the following summary of the evidence on the question of sales is necessary:

Gates and National were separate corporations. National was wholly-owned by Gates. Gates offered no explanation of its purpose in maintaining National as a separate corporation over many years. When a sale of National Tires was made to a tire dealer customer, the customer was invoiced on an invoice which purported to come from National. He received a bill that purported to come from National. His payment went into a bank account established under the name "National Tires, Inc." An invoice was prepared monthly which reflected sales by Gates to National. A monthly bill was prepared which reflected that Gates was billing National for National Tires sold

during the month. National was given a customer number by Gates similar in character to that given by Gates to Security. Gates' invoices and bills indicated that they related to "purchases" of tires by National. Accounting entries were maintained which reflected charges to National for National tires sold and credits to National for payments made when monies were withdrawn from the National bank account and paid over to Gates. The same sort of entries were made in connection with sales to Security. Though the employees who performed all of these functions and who handled the sale of National Tires were paid and furnished offices and facilities by Gates, charges were made on Gates' books to National for all of these functions. Though all of the directors of National were associated with Gates, most were not directors of Gates. Profit and loss statements were prepared with respect to the National operations. Balance sheets were prepared for it at the end of each year. Consolidated tax returns were filed on behalf of both corporations. A former officer of Gates testified that National tires were "sold" by Gates to National; that they were "transferred"; that by transfer, he meant that ownership of tires was transferred from Gates to National; and that Gates had a separate sales force. The testimony of the National sales manager rather clearly reflects that though he was furnished cost figures for National tires and given a total profit objective for the National operation, it was he who set the prices at which individual sizes and kinds of National tires would be sold in order to meet that objective, and that not he, but other persons, performed the pricing functions with respect to the other tires made by Gates. Stationery containing the letterhead "National Tires, Inc." and that containing the letterhead "Gates Rubber Company" showed different phone numbers and different addresses (or the same address stated differently). The National sales manager wrote

Security a letter under the letterhead of "National Tires, Inc." in which he stated that "Nashville", referring to the Nashville tire plant of Gates, is "required to wire and ask us (obviously referring to National) for the price of National tires shipped out of Nashville." A price list purporting to be published by National exhorted its customers to buy now because later "we will be paying higher prices to the Company" obviously meaning Gates. In a sworn response (later changed) to written interrogatories, Gates stated that some tire moulds were held in the name of National. In sworn answers to other interrogatories, also later changed, when asked what price National paid Gates for certain tires, Gates answered "T.P.C. (meaning Total Plant Cost) plus all actual expenses". In another sworn response to a written interrogatory which asked whether financial statements were prepared for National and that copies be furnished, Gates answered (its answer was later changed) with an objection that any such financial statements would not be relevant because "National Tires, Inc. manufactured belts and hoses as well as tires during the period of 1969 - 1973."

FEDERAL JURISDICTION

The basis for Federal jurisdiction in the first instance in this case is 15 U.S.C., Section 15.

REASONS FOR GRANTING WRIT OF CERTIORARI

This case involves the application of the Robinson-Patman Act to multiple distribution systems - i.e. to arrangements under which manufacturers distribute their products through independent distributors who buy the products for resale and also through their own corporate

subsidiaries, which sell in competition with the independents. Generally, a violation of the Act requires at least two sales - one to a favored customer and one to a disfavored customer. The question presented here is simply whether a sale by a manufacturer to its wholly-owned separate-corporation subsidiary can be a sale to a favored customer of which the disfavored independent can complain. This is a profoundly important question of federal law which has not been, but should be, settled by this Court.

In a nutshell, the Court of Appeals has held that:

(1) There is no sale when a manufacturer makes an interdepartmental transfer from its manufacturing department to its sales department as an incident to distribution of its own product;

(2) There is no difference, except of form, between such an interdepartmental transfer and a transfer from a manufacturer to its wholly-owned corporate subsidiary;

(3) In antitrust law, substance prevails over form;

(4) Therefore, a transfer from parent to corporate subsidiary is not a sale for purposes of the Robinson-Patman Act.

The converse of the foregoing analysis can be argued with equal logic and greater fidelity to the purpose of Robinson-Patman. That purpose, obviously, is to preserve competition by protecting the disfavored customer from destruction resulting from price discrimination in favor of a competitor. From the standpoint of the disfavored customer, it makes no difference whether the favored customer is independent of or a wholly-owned subsidiary of the common supplier. If the disfavored customer faces loss or destruction because it must compete against a party who

can buy commodities for resale more cheaply, its dilemma is the same, whatever the connection between the supplier and the favored customer. It makes no difference to Security that its favored competitor was National rather than an independent "beneficiary" (in the words of the Court of Appeals). The destructive result, from its standpoint, is exactly the same.

The foregoing analysis has been used to argue that even interdepartmental transfers are within the ambit of the Act. See *Reines Distribution v. Admiral Corp.*, 256 F.Supp. 581 (SDNY, 1966). This argument runs afoul of the canon of statutory construction that words are to be given their commonly understood meanings. The words "price", "purchaser" and "purchase" do not, as commonly used, connote transfers between different departments of a single corporate entity. Further, there is legislative history which indicates that Congress did not intend any such thing. See footnote 1 in *Reines*, above.

A transfer from parent to subsidiary corporation faces no such obstacle. It is hornbook law that the two are separate entities. There are literally hundreds of reported cases in nearly every field of law in which the concept of separate corporate entity has been decisive. One immediately thinks of questions of jurisdiction, venue, income tax, franchise tax, creditor's rights, torts, contracts, agency, bailment and employer's liability. In none of these fields is there any doubt that there can be a sale by a parent to a subsidiary. In view of the immense consequences accorded the concept of separate corporate entity in other fields of law, why should it be disregarded for purposes of Robinson-Patman? There is nothing in the Act to suggest that the words "purchase", "purchaser" and "price" were used as words of art or were intended to have other than their ordinary and usual meanings.

From this, it follows that the refusal by the Court of Appeals to characterize the transactions between Gates and National as sales under Robinson-Patman amounts to nothing less than a policy decision (whether or not consciously adopted) to limit the application of the Act in a way not warranted by its language.

Further, the opinion of the Court of Appeals raises more questions than it answers. If there can never be a sale from parent to 100% owned subsidiary, what of a 90% owned subsidiary? 50%? Subsidiary controlled in fact by ownership of less than 50%? Also, the Court's analysis differs from that found in other opinions which have discussed sales from parent to subsidiary and the closely related question of whether sales by parent and subsidiary are sales by the same seller, so that there is discrimination if the sales are at different prices. (The Court of Appeals' opinion cites almost all of the cases known to counsel directly involving these questions.) In one opinion, parent and subsidiary are said to be separate if they hold themselves out as being separate or if the parent does not control the subsidiary's pricing. In others, the control factor alone is treated as critical. None explain how a wholly-owned subsidiary can fail to be subject to the control of the parent. Only this case holds that there can never be a sale from parent to subsidiary.

Given the importance of Robinson-Patman to the commercial life of the country, this is a case in which writ of certiorari should be granted by the Court under the criteria announced by this Court in its Rule 19(1)(b).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

BEARD & KULTGEN
DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703
Attorneys for Petitioner

PROOF OF SERVICE

I, David B. Kultgen, one of the attorneys for Security Tire & Rubber Company, a Virginia corporation, Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 10th day of September, 1979, I served copies of the foregoing petition for writ of certiorari on the Gates Rubber Company, Respondent, by mailing three (3) copies in a duly addressed and certified envelope with first class postage paid to its attorney of record, Louis P. Bickel, Bickel and Case, 5441 First International Building, Dallas, Texas 75270.

It is further certified that all parties required to be served have been served.

BEARD & KULTGEN
DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703

APPENDIX

APPENDIX A

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Plaintiffs-Appellees,

v.

The GATES RUBBER COMPANY, a Colorado Corporation, Defendant-Appellant.

The GATES RUBBER COMPANY, a Colorado Corporation, Plaintiff-Appellant,

v.

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Defendants-Appellees.

No. 77-1943

United States Court of Appeals, Fifth Circuit.

July 12, 1979.

Plaintiffs, private brand sellers of tires, brought action on claim of Robinson-Patman Act price discrimination, among others, against defendant tire manufacturer; defendant brought action on account, and the causes were consolidated. The United States District Court for the Western District of Texas, Jack Roberts, J., entered single judgment under both cause numbers in favor of plaintiffs and defendant, and appeals were taken. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) a tire manufacturer's transfers of tires to its wholly owned sales sub-

sidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim, and (2) transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

Reversed in part; affirmed in part; and remanded.

1. Trade Regulation (Key) 914

A tire manufacturer's transfers of tires to its wholly owned sales subsidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

2. Trade Regulation (Key) 914

Transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

3. Trade Regulation (Key) 914

Intracorporate transfers and transfers between parent and a wholly owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

Appeals from the United States District Court for the Western District of Texas.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This is primarily a price discrimination case brought under Section 2(a) of the Robinson-Patman Act. 15 U.S.C.A. § 13. We hold that Plaintiffs have failed to allege or prove a discriminatory sale to be a favored customer.

I.

The factual background and the course of proceedings relevant to our decision today may be briefly summarized.

In 1964, Plaintiffs, Security Tire & Rubber Company, a Texas Corporation (Security-Texas), and Security Tire & Rubber Company, a Virginia Corporation (Security-Virginia), embarked on a course of dealing with the Defendant, The Gates Rubber Company, a Colorado Corporation (Gates). This course of dealing eventually led to the present litigation.

Defendant Gates is in the rubber manufacturing business. Gates' product line included tires for motor vehicles until the Fall of 1973, when it sold its Nashville, Tennessee tire manufacturing facility to Armstrong Rubber Company. Gates completely ceased tire manufacturing by the Spring of 1974. Plaintiffs, Security-Texas and Security-Virginia were "private brand" sellers of tires, although Security-Texas was not actively selling tires after early 1970. A "private brand" is a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. The Plaintiffs commenced in their venture in 1964, and from then until the Fall of 1973 they purchased most of their tires from Gates. The Plaintiffs marketed tires under the label of "Security" and did business predominantly in the Southeast United States.

At the outset, the parties operated under a verbal understanding. Subsequently, they reduced certain terms of their dealing to a written contract on July 17, 1969. The written contract did not set the prices of the tires to be manufactured by Gates and bought by Plaintiffs, nor did it require Plaintiffs to purchase any given number of tires. It merely provided that Plaintiffs were to purchase eighty percent of their requirements from Gates, if Gates produced the type of tire required by Plaintiffs. The written contract also provided for cancellation by any party upon one-hundred and eighty days notice.

During the period relevant to this lawsuit, 1969-73, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc. (National). In effect, Gates marketed tires under the National label.

The somewhat complicated procedural history of this suit begins on February 8, 1974, when Plaintiffs, Security-Texas and Security-Virginia, instituted a lawsuit in the Western District of Texas against Defendant Gates, filed as No. W-74-CA-9. The complaint alleged several different causes of action, including a treble damage action under the Robinson-Patman Act alleging a secondary line discrimination, a claim for a breach of warranty for an alleged failure to manufacture tires properly and a claim for a breach of contract for Gates' alleged failure to give timely notice of the cancellation of the July 17, 1969, contract. The complaint also alleged, and thus admitted, that Plaintiffs were indebted to Gates for tires and demanded that the debt be offset against their damages and that recovery be allowed for damages in excess of the debt. On February 22, 1974, Gates instituted a suit on an account against Security-Virginia in the Chancery Court of Davidson County, Tennessee which was removed to the federal court for the Middle District of Tennessee. By court order, Gates' action was transferred from the Middle District of Tennessee to the Western District of Texas on June 4, 1974, and it was assigned No. W-74-CA-41. The answer in No. W-74-CA-41 incorporated the complaint filed in No. W-74-CA-9 and demanded an offset of damages against the debt owed Gates. The Plaintiffs' cause, No. W-74-CA-9, and Gates' cause, No. W-74-CA-41, were consolidated for purposes of pretrial proceedings and trial.

By way of an Amended Complaint in No. W-74-CA-9, which was filed on January 18, 1977, the Plaintiffs abandoned all but three of their claims. The claims contained in the Amended Complaint and tried in the District Court were: (1) the Robinson-Patman treble damage claim; (2) the breach of contract claim for the alleged failure of Gates to manufacture tires in accordance with the warranty and standards of the Federal Department of Transportation; and (3) the breach of contract claim for the alleged failure of Gates to provide Plaintiffs with six months notice of cancellation of the July 17, 1969 contract. Gates' claim on the account against Security-Virginia was asserted in No. W-74-CA-41 and also as a counterclaim in No. W-74-CA-9, but was tried as a companion or consolidated case along with No. W-74-CA-9.

Both of the above cases were tried to a jury commencing on March 8, 1977. Gates' claim on the account against Security-Virginia, No. W-74-CA-41, was not submitted to the jury inasmuch as Security-Virginia admitted the account and stipulated that Gates had proven all the elements of its claim on the account. Upon Gates' motion, the District Court entered a judgment on the account. Plaintiffs' claims, No. W-74-CA-9, were submitted to the jury on a general charge, and the jury rendered a general verdict. The jury found for the Plaintiffs on the antitrust claim in the amount of $100,000 and for the Plaintiffs

on the claim of breach of contract for failure to give timely notice on the cancellation of the contract in the amount of $3,667. The jury rendered a general verdict for Gates on the Plaintiffs' claim for breach of warranty.

On March 23, 1977, the District Court entered a single judgment under both cause numbers. The judgment awarded the Plaintiffs the sum of $303,667, representing the $100,000 on the antitrust claim trebled plus $3,667 on the breach of contract claim for failure to give notice of cancellation. The judgment also awarded Plaintiffs their costs and attorneys' fees, with the proviso that the amount of attorneys' fees would be determined at the conclusion of any appeal which might be taken from the judgment or at such time as the judgment became final. The judgment further awarded Gates $458,235.69, together with interest at the legal rate until paid, on the account against Security-Virginia. The judgment failed to award Gates prejudgment interest, attorneys' fees or costs. An amended judgment was entered on April 20, 1977, which deleted Security-Texas as a prevailing party in No. W-74-CA-9, pursuant to a postjudgment motion made by Gates. However, the amended judgment failed to make any disposition of Security-Texas. To that end, a second amended judgment was entered on May 27, 1977, which provided that Security-Texas take nothing for its causes of action.

II.

Section 2(a), in pertinent part, reads: "It shall be unlawful for any person . . . to discriminate in price between *different purchasers* of commodities . . . where *such commodities are sold* for use, consumption, or resale within the United States." 15 U.S.C.A. § 13(a) (emphasis supplied). Courts have interpreted the Section 2(a) language to require that a plaintiff establish two separate and con-

temporaneous sales transactions made by the same seller to two distinct purchasers. "[N]o single sale can violate the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 1021, 91 L.Ed. 1219 (1947). Besides being suggested by the very language of the statute, the requirement of two transactions is implicit in the purpose of the Robinson-Patman Act. Anti-competitive price discrimination among competing buyers is the evil the statute prohibits. For price discrimination to occur, it is axiomatic that one purchaser must pay more than another purchaser; there must be two or more transactions at different prices. *See generally Areeda, Antitrust Analysis* ¶¶ 701-740 (2d ed. 1974); *Kitner, A Robinson Patman Primer* 77-78 (1970); *Rowe, Price Discrimination under the Robinson Patman Act* (1964); *Sullivan, Antitrust* §§ 217-19, 222-25 (1977); *Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.03 (1975). *See also generally, e. g., Hampton v. Graff Vending Co.*, 516 F.2d 100, 102 (5th Cir. 1975); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

The theory and proof of Plaintiffs' case assigned National the role of their competitor and the beneficiary of Gates' price discrimination—the so-called "favored customer." Plaintiffs sought to assign themselves the roles of the victims of Gates' price discrimination—the so-called "disfavored customers." It is important to note that National, the wholly-owned subsidiary of Gates, was the only customer of Gates alleged to have been favored; there was neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination.

[1, 2] Assuming *arguendo* that Plaintiffs established the other prerequisites for a recovery, their theory and proof would support the jury's verdict only if the transfers of tires from Gates to its wholly-owned subsidiary, National, were considered sales within the meaning of the Robinson-Patman Act. Today, we reject what little authority we have found supporting the theory that under some circumstances a parent corporation's transfers to its wholly-owned subsidiary may be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Briefly, we shall explore the history of this theory and explain why we are not persuaded to follow in its future. Ours is a different course. We hold that transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

The origins of the theory we reject today lie in *Danko v. Shell Oil Co.*, 115 F.Supp. 886 (E.D.N.Y. 1953). In *Danko* the operator of a gasoline retail station sued a gasoline distributor and alleged, "the defendant directly or indirectly owns, operates, maintains and controls a gas station within one mile of plaintiff's station and *grants itself preferential treatment and discriminates against the plaintiff.*" *Id.* at 888 (emphasis added). Thus, the plaintiff in *Danko* alleged, *inter alia*, that it was the disfavored customer and sought to compare its purchases from the defendant with sales from the defendant to the defendant's wholly-owned retail gasoline stations to establish a price discrimination. The District Court denied the defendant's motion to dismiss for failure to state a claim on which relief could be granted without providing any economic, antitrust analysis and without citing any significant controlling precedent:

> The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship, if discriminatory, would be permitted to accomplish such objective. See for analogy, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199, and cases cited therein. That the Court actually looks behind form to see who the real competitors are, see *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 7 Cir., 153 F.2d 907, 913, 914. Surely, all of these unresolved factual questions, coupled with the statement in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 91 L.Ed. 1219, with respect to what types of sales are actually discriminatory, constrain the Court to overrule the objection to the third cause of action.

Id. With the offhand observation, "The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser," the District Court, seemingly unwittingly, created antitrust theory. At least, the District Court declined to dismiss the complaint which it understood to depend upon such a theory.

The apparent basis of this theory is found in the general postulate of antitrust law that substance and true competitive function control rather than corporate form. By analogy, the District Court relied on *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) which involved the rather remote question whether a partially-owned subsidiary corporation could conspire with its parent corporation in violation of the Sherman Act. *See also Perkins v. Standard Oil Co.*,

395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951). The validity of this antitrust postulate is beyond peradventure, and with it we have no quarrel. There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute. We simply refuse to follow the *Danko* analogy here. At the same time, we do not seek to exalt form over substance. Instead, we are convinced that substance may be coincident with form and that this is such a situation. If there be a form versus substance issue here, we are quite convinced that our antitrust analysis more properly emphasizes substance over form than the theory we reject today.

Although several courts have noted the theory first suggested in *Danko*, we have found no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the theory.[1] We decline to be the first, for we are left unpersuaded by the mere repetition of all this encysted *obiter dictum*.[2]

---

1. *Parrish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978); *Brown v. Hansen*, 556 F.2d 969 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-776 n.17 (N.D.Ohio 1976); *Schaben v. Samuel Moore and Co.*, 462 F.Supp. 1321, 1330 (S.D.Iowa 1978); *Diehl & Sons, Inc. v. International Harvester Company*, 426 F.Supp. 110, 123 (E.D.N.Y. 1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 413 F.Supp. 724, 730-31 (S.D.Ill. 1976); *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915, 919 (D.Haw. 1967); *Reines Distributors, Inc. v. Admiral Corporation*, 241 F.Supp. 814, 815, 256 F.Supp. 581, 585-86, 257 F.Supp. 619, 621 (S.D.N.Y. 1965). The unofficially reported decision in *Mississippi Petroleum Inc. v. Vermont Gas Systems, Inc.*, 1972 Trade Cases ¶ 73,843 (S.D.Miss. 1972) is not to the contrary.

2. Long ago, Mr. Justice Holmes once lamented: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912) (Holmes, J., dissenting).

Here, we deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unit. *See Areeda, Antitrust Analysis* ¶ 701 n.12 (2d ed. 1974). There are other situations in which the single economic unit approach is applied which we find much more relevant to the issue at hand than the *Danko* analogy. If there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent. Thus, a plaintiff might establish a Robinson-Patman Act violation if the evidence shows a price discrimination between a customer of the parent corporation and a customer of the wholly-owned subsidiary. The subsidiary and parent are treated as the same seller. The identical analysis is applied to determine whether a remote purchaser-plaintiff is an indirect purchaser from a seller which is involved in its customer's dealings with the plaintiff. *See generally Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Baim & Blank, Inc. v. Philco Corp.*, 148 F.Supp. 541 (E.D.N.Y. 1966). *See also generally Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.04 [2], [3] (1975). These theories, which are neither invoked nor involved here, highlight the theoretical flaw in the *Danko* approach. In the application of both the same seller doctrine and the independent purchaser doctrine, the parent and wholly-owned subsidiary are treated as a single economic unit. Thus, sales from the same economic unit to the favored customer and to the disfavored customer are compared to determine whether there has been a price discrimination. The requirement of two sales is satisfied. The *Danko* theory lacks this requirement. Under *Danko*, a sale from the parent corporation to the plaintiff is alleged as the disfavored sale. However, there is no sale to a favored customer for comparison and thus

no price discrimination may be shown. Transfers from a parent corporation to its wholly-owned subsidiary corporation are transfers within the same economic unit. These transfers are the economic equivalent of intra-company transfers of goods. As such, these transfers cannot be considered sales for Robinson-Patman Act purposes. *See generally* authorites cited in note 1, *supra*. *See also generally Von Kalinowski, Antitrust Laws & Trade Regulation* § 24.03[2] (1975).

[3] The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intracorporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the *Danko* theory couched in terms of "control" and "arm's length dealings." Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. There is nothing in this record to suggest that disregarding the separate corporate entities will enable Gates and National to circumvent the Robinson-Patman Act. *See generally Brown v. Hansen Publications*, 556 F.2d 969, 972 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 448 F.2d 972, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-76 n.17 (N.D.Ohio 1976); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110, 123 (E.D.N.Y. 1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724, 731 (S.D.Ill. 1976). In this manner underlying substance controls surface form in economic and antitrust importance. In form, Gates sought to raise a corporate veil between its manu-

facturing and sales efforts by conducting its own retail operations through a separate corporate entity. There being no other owner of National besides Gates, the substance of this marketing technique was simply that a single economic unit manufactured and marketed its product. Therefore, we hold that a parent corporation's transfers to its wholly-owned subsidiary may not be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Since National was the only customer of Gates alleged to have been favored and since there was neither any further allegation nor proof of any other beneficiary of Gates' alleged discrimination, Plaintiffs have failed to establish the requisite favored sale for a Robinson-Patman Act suit.[3]

III.

The remaining issues Gates raises need not long detain us. First, we are not persuaded by Gates' efforts to upset the breach of contract recovery. Second, we do not believe that the District Court abused its discretion in deny-

---

3. Pragmatically our rejection or acceptance of the *Danko* theory would not change the fate of Plaintiffs' appeal. Even under the theory we reject, the separateness of parent and wholly-owned subsidiary must be established in order for a transfer between them to be considered a favored sale. There must be some showing of a lack of control by the parent and arm's length dealings between parent and subsidiary. *See* authorities cited note 1, *supra*. The Plaintiffs here depend on little else but the apperances of independence incident to Gates' and National's separate corporate status. Gates exercised full dominion and control over National; there was no arm's length dealings between them. Thus, on this record we would reverse even under the *Danko* theory had we found the theory itself persuasive. *See Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (appellate standard for review of jury verdict).

Those who suffer real antitrust damage are not necessarily left without any antitrust remedy either under our own analysis or under an unsuccessful attempt to recover on the *Danko* theory we reject. *See, e. g., Schaben v. Samuel Moore and Company*, 462 F.Supp. 1321, 1332 (S.D.Iowa 1973); *Reines Distributors, Inc. v. Admiral Corp.*, 256 F.Supp. 581, 586 (S.D.N.Y. 1966).

ing Gates prejudgment interest in No. W-74-CA-41. Third, given our reversal of the Robinson-Patman Act claim, we deem it appropriate to remand for a reassessment of the issue of costs before the District Court in No. W-74-CA-41; costs on this appeal are awarded to Gates as the prevailing party. Fourth, we find no error in the District Court's failure to award Gates attorneys' fees in No. W-74-CA-41. Finally, we reject Gates' claim that it was entitled, as a matter of right, to two separate judgments here.

IV.

In summary, in No. W-74-CA-9, the Robinson-Patman Act claim is reversed, the breach of contract claim is affirmed; in No. W-74-CA-41 we affirm except we remand for reassessment of the issue of costs before the District Court.

REVERSED in part; AFFIRMED in part; and REMANDED.

Supreme Court, U. S.
FILED
OCT 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE & RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

SUPPLEMENTAL APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEARD & KULTGEN
DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Supplemental Appendices to Petition 1
Proof of Service 2
Appendix B—Judgment of the United States Court of Appeals for the Fifth Circuit A15
Appendix C—Corrected Opinion A17

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

SECURITY TIRE & RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

SUPPLEMENTAL APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDICES TO PETITION

After mailing of petition for writ of certiorari in the above cause to the Clerk of the United States Supreme Court, counsel for Petitioner received from the Clerk of the United States Court of Appeals for the Fifth Circuit a copy of the judgment rendered by that Court in this cause, together with a copy of a corrected opinion. The Judgment is reproduced as Appendix B in this supplement. The corrected opinion is reproduced as Appendix C.

BEARD & KULTGEN
By DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703
Attorneys for Petitioner

PROOF OF SERVICE

I, David B. Kultgen, one of the attorneys for Security Tire & Rubber Company, a Virginia corporation, Petitioner herein, and a member of the bar of the Supreme Court of The United States hereby certify that, on the 25th day of September, 1979, I served copies of the supplemental appendices to petition for writ of certiorari on the Gates Rubber Company, Respondent, by mailing three (3) copies in a duly addressed and certified envelope with the first class postage paid to its attorney of record, Louis P. Bickel, Bickel and Case, 5441 First International Building, Dallas, Texas 75270.

It is further certified that all parties required to be served have been served.

BEARD & KULTGEN
DAVID B. KULTGEN
P.O. Box 529
Waco, Texas 76703

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1943

D. C. Docket Nos. W-74-CA-9 and W-74-CA-41

SECURITY TIRE & RUBBER COMPANY, a Texas corporation, and SECURITY TIRE & RUBBER COMPANY, a Virginia corporation,
Plaintiffs-Appellees,

versus

THE GATES RUBBER COMPANY,
a Colorado corporation,
Defendant-Appellant.

* * * * *

THE GATES RUBBER COMPANY,
a Colorado corporation,
Plaintiff-Appellant,

versus

SECURITY TIRE & RUBBER COMPANY, a Texas corporation, and SECURITY TIRE & RUBBER COMPANY, a Virginia corporation,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

JUDGMENT

(Filed September 13, 1979)

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part; affirmed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that appellees pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

July 12, 1979

ISSUED AS MANDATE: SEP 11, 1979

APPENDIX C

CORRECTED OPINION

(Filed September 13, 1979)

SECURITY TIRE & RUBBER COMPANY a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Plaintiffs-Appellees,

v.

The GATES RUBBER COMPANY, a Colorado Corporation,
Defendant-Appellant.

The GATES RUBBER COMPANY, a Colorado Corporation,
Plaintiff-Appellant,

v.

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Defendants-Appellees.

No. 77-1943.

United States Court of Appeals,
Fifth Circuit.

July 12, 1979.

Plaintiffs, private brand sellers of tires, brought action on claim of Robinson-Patman Act price discrimination, among others, against defendant tire manufacturer; defendant brought action on account, and the causes were consolidated. The United States District Court for the Western District of Texas, Jack Roberts, J., entered single judgment under both cause numbers in favor of plaintiffs and defendant, and appeals were taken. The Court of Appeals,

James C. Hill, Circuit Judge, held that: (1) a tire manufacturer's transfers of tires to its wholly owned sales subsidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim, and (2) transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

Reversed in part; affirmed in part; and remanded.

1. Trade Regulation (Key) 914

A tire manufacturer's transfers of tires to its wholly owned sales subsidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

2. Trade Regulation (Key) 914

Transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patnam Act discrimination suit. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

3. Trade Regulation (Key) 914

Intracorporate transfers and transfers between parent and a wholly owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

Appeals from the United States District Court for the Western District of Texas.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This is primarily a price discrimination case brought under Section 2(a) of the Robinson-Patman Act. 15 U.S.C.A. § 13. We hold that Plaintiffs have failed to allege or prove a discriminatory sale to a favored customer.

I.

The factual background and the course of proceedings relevant to our decision today may be briefly summarized.

In 1964, Plaintiffs, Security Tire & Rubber Company, a Texas Corporation (Security-Texas), and Security Tire & Rubber Company, a Virginia Corporation (Security-Virginia), embarked on a course of dealing with the Defendant, The Gates Rubber Company, a Colorado Corporation (Gates). This course of dealing eventually led to the present litigation.

Defendant Gates is in the rubber manufacturing business. Gates' product line included tires for motor vehicles until the Fall of 1973, when it sold its Nashville, Tennessee tire manufacturing facility to Armstrong Rubber Company. Gates completely ceased tire manufacturing by the Spring of 1974. Plaintiffs, Security-Texas and Security-Virginia were "private brand" sellers of tires, although Security-Texas was not actively selling tires after early 1970. A "private brand" is a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. The Plaintiffs commenced in their venture in 1964, and from then until the Fall of 1973 they purchased most of their tires from Gates. The Plaintiffs marketed tires under the label of

"Security" and did business predominantly in the Southeast United States.

At the outset, the parties operated under a verbal understanding. Subsequently, they reduced certain terms of their dealing to a written contract on July 17, 1969. The written contract did not set the prices of the tires to be manufactured by Gates and bought by Plaintiffs, nor did it require Plaintiffs to purchase any given number of tires. It merely provided that Plaintiffs were to purchase eighty percent of their requirements from Gates, if Gates produced the type of tire required by Plaintiffs. The written contract also provided for cancellation by any party upon one-hundred and eighty days notice.

During the period relevant to this lawsuit, 1969-73, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc. (National). In effect, Gates marketed tires under the National label.

The somewhat complicated procedural history of this suit began on February 8, 1974, when Plaintiffs, Security-Texas and Security-Virginia, instituted a lawsuit in the Western District of Texas against Defendant Gates, filed as No. W-74-CA-9. The complaint alleged several different causes of action, including a treble damage action under the Robinson-Patman Act alleging a secondary line discrimination, a claim for a breach of warranty for an alleged failure to manufacture tires properly and a claim for a breach of contract for Gates' alleged failure to give timely notice of the cancellation of the July 17, 1969, contract. The complaint also alleged, and thus admitted, that Plaintiffs were indebted to Gates for tires and demanded that the debt be offset against their damages and that recovery be allowed for damages in excess of the debt. On February 22, 1974, Gates instituted a suit on an account against

Security-Virginia in the Chancery Court of Davidson County, Tennessee which was removed to the federal court for the Middle District of Tennessee. By court order, Gates' action was transferred from the Middle District of Tennessee to the Western District of Texas on June 4, 1974, and it was assigned No. W-74-CA-41. The answer in No. W-74-CA-41 incorporated the complaint filed in No. W-74-CA-9 and demanded an offset of damages against the debt owed Gates. The Plaintiffs' cause, No. W-74-CA-9, and Gates' cause, No. W-74-CA-41, were consolidated for purposes of pretrial proceedings and trial.

By way of an Amended Complaint in No. W-74-CA-9, which was filed on January 18, 1977, the Plaintiffs abandoned all but three of their claims. The claims contained in the Amended Complaint and tried in the District Court were: (1) the Robinson-Patman treble damage claim; (2) the breach of contract claim for the alleged failure of Gates to manufacture tires in accordance with the warranty and standards of the Federal Department of Transportation; and (3) the breach of contract claim for the alleged failure of Gates to provide Plaintiffs with six months notice of cancellation of the July 17, 1969 contract. Gates' claim on the account against Security-Virginia was asserted in No. W-74-CA-41 and also as a counterclaim in No. W-74-CA-9, but was tried as a companion or consolidated case along with No. W-74-CA-9.

Both of the above cases were tried to a jury commencing on March 8, 1977. Gates' claim on the account against Security-Virginia, No. W-74-CA-41, was not submitted to the jury inasmuch as Security-Virginia admitted the account and stipulated that Gates had proven all the elements of its claim on the account. Upon Gates' motion, the District Court entered a judgment on the account. Plaintiffs' claims, No. W-74-CA-9, were submitted to the

jury on a general charge, and the jury rendered a general verdict. The jury found for the Plaintiffs on the antitrust claim in the amount of $100,000 and for the Plaintiffs on the claim of breach of contract for failure to give timely notice on the cancellation of the contract in the amount of $3,667. The jury rendered a general verdict for Gates on the Plaintiffs' claim for breach of warranty.

On March 23, 1977, the District Court entered a single judgment under both cause numbers. The judgment awarded the Plaintiffs the sum of $303,667, representing the $100,000 on the antitrust claim trebled plus $3,667 on the breach of contract claim for failure to give notice of cancellation. The judgment also awarded Plaintiffs their costs and attorneys' fees, with the proviso that the amount of attorneys' fees would be determined at the conclusion of any appeal which might be taken from the judgment or at such time as the judgment became final. The judgment further awarded Gates $458,235.69, together with interest at the legal rate until paid, on the account against Security-Virginia. The judgment failed to award Gates prejudgment interest, attorneys' fees or costs. An amended judgment was entered on April 20, 1977, which deleted Security-Texas as a prevailing party in No. W-74-CA-9, pursuant to a postjudgment motion made by Gates. However, the amended judgment failed to make any disposition of Security-Texas. To that end, a second amended judgment was entered on May 27, 1977, which provided that Security-Texas take nothing for its causes of action.

II.

Section 2(a), in pertinent part, reads: "It shall be unlawful for any person . . . to discriminate in price between *different purchasers* of commodities . . . where *such commodities are sold* for use, consumption, or resale within the United States." 15 U.S.C.A. § 13(a) (emphasis added). Courts have interpreted the Section 2(a) language to require that a plaintiff establish two separate and contemporaneous sales transactions made by the same seller to two distinct purchasers. "[N]o single sale can violate the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 1021, 91 L.Ed. 1219 (1947). Besides being suggested by the very language of the statute, the requirement of two transactions is implicit in the purpose of the Robinson-Patman Act. Anticompetitive price discrimination among competing buyers is the evil the statute prohibits. For price discrimination to occur, it is axiomatic that one purchaser must pay more than another purchaser; there must be two or more transactions at different prices. *See generally Areeda, Antitrust Analysis* ¶¶ 701-740 (2d ed. 1974); *Kitner, A. Robinson Patman Primer* 77-78 (1970); *Rowe, Price Discrimination under the Robinson Patman Act* (1964); *Sullivan, Antitrust* §§ 217-19, 222-25 (1977); *Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.03 (1975). *See also generally, e. g., Hampton v. Graff Vending Co.*, 516 F.2d 100, 102 (5th Cir. 1975); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Hartley & Parker Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

The theory and proof of Plaintiffs' case assigned National the role of their competitor and the beneficiary of Gates' price discrimination—the so-called "favored customer." Plaintiffs sought to assign themselves the roles of the victims of Gates' price discrimination—the so-called "disfavored customers." It is important to note that National, the wholly-owned subsidiary of Gates, was the only customer of Gates alleged to have been favored; there was

neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination.

[1, 2] Assuming *arguendo* that Plaintiffs established the other prerequisites for a recovery, their theory and proof would support the jury's verdict only if the transfers of tires from Gates to its wholly-owned subsidiary, National, were considered sales within the meaning of the Robinson-Patman Act. Today, we reject what little authority we have found supporting the theory that under some circumstances a parent corporation's transfers to its wholly-owned subsidiary may be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Briefly, we shall explore the history of this theory and explain why we are not persuaded to follow in its future. Ours is a different course. We hold that transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

The origins of the theory we reject today lie in *Danko v. Shell Oil Co.*, 115 F.Supp. 886 (E.D.N.Y.1953). In *Danko* the operator of a gasoline retail station sued a gasoline distributor and alleged, "the defendant directly or indirectly owns, operates, maintains and controls a gas station within one mile of plaintiff's station and *grants itself preferential treatment and discriminates against the plaintiff.*" *Id.* at 888 (emphasis added). Thus, the plaintiff in *Danko* alleged, *inter alia*, that it was the disfavored customer and sought to compare its purchases from the defendant with sales from the defendant to the defendant's wholly-owned retail gasoline stations to establish a price discrimination. The District Court denied the defendant's motion to dismiss for failure to state a claim on which relief could be granted without providing any economic,

antitrust analysis and without citing any significant controlling precedent:

> The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship, if discriminatory, would be permitted to accomplish such objective. See for analogy, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199, and cases cited therein. That the Court actually looks behind form to see who the real competitors are, see *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 7 Cir., 153 F.2d 907, 913, 914. Surely, all of these unresolved factual questions, coupled with the statement in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 91 L.Ed. 1219, with respect to what types of sales are actually discriminatory, constrain the Court to overrule the objection to the third cause of action.

Id. With the off-hand observation, "The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser," the District Court, seemingly unwittingly, created antitrust theory. At least, the District Court declined to dismiss the complaint which it understood to depend upon such a theory.

The apparent basis of this theory is found in the general postulate of antitrust law that substance and true competitive function control rather than corporate form. By analogy, the District Court relied on *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) which involved the rather remote question whether a partially-owned subsidiary corporation could conspire with its parent corporation in violation of

the Sherman Act. *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951). The validity of this antitrust postulate is beyond peradventure, and with it we have no quarrel. There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute. We simply refuse to follow the *Danko* analogy here. At the same time, we do not seek to exalt form over substance. Instead, we are convinced that substance may be coincident with form and that this is such a situation. If there be a form versus substance issue here, we are quite convinced that our antitrust analysis more properly emphasizes substance over form than the theory we reject today.

Although several courts have noted the theory first suggested in *Danko*, we have found no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the theory.[1] We decline to be the first, for we are left unpersuaded by the mere repetition of all this encysted *obiter dictum*.[2]

---

1. *Parrish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978); *Brown v. Hansen*, 556 F.2d 969 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-776 n.17 (N.D.Ohio 1976); *Schaben v. Samuel Moore and Co.*, 462 F.Supp. 1321, 1330 (S.D.Iowa 1978); *Diehl & Sons, Inc. v. International Harvester Company*, 426 F.Supp. 110, 123 (E.D.N.Y.1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724, 730-31 (S.D.Ill.1976); *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915, 919 (D.Haw.1967); *Reines Distributors, Inc. v. Admiral Corporation*, 241 F.Supp. 814, 815, 256 F.Supp. 581, 585-86, 257 F.Supp. 619, 621 (S.D.N.Y.1965). The unofficially reported decision in *Mississippi Petroleum Inc. v. Vermont Gas Systems, Inc.*, 1972 Trade Cases ¶ 73,843 (S.D.Miss.1972) is not to the contrary.

2. Long ago, Mr. Justice Holmes once lamented: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912) (Holmes, J., dissenting).

Here, we deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unit. *See Areeda, Antitrust Analysis* ¶ 701 n.13 (2d ed. 1974). There are other situations in which the single economic unit approach is applied which we find much more relevant to the issue at hand than the *Danko* analogy. If there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent. Thus, a plaintiff might establish a Robinson-Patman Act violation if the evidence shows a price discrimination between a customer of the parent corporation and a customer of the wholly-owned subsidiary. The subsidiary and parent are treated as the same seller. The identical analysis is applied to determine whether a remote purchaser-plaintiff is an indirect purchaser from a seller which is involved in its customer's dealings with the plaintiff. *See generally Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Baim & Blank, Inc. v. Philco Corp.*, 148 F.Supp. 541 (E.D.N.Y.1966). *See also generally Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.04 [2], [3] (1975). These theories, which are neither invoked nor involved here, highlight the theoretical flaw in the *Danko* approach. In the application of both the same seller doctrine and the independent purchaser doctrine, the parent and wholly-owned subsidiary are treated as a single economic unit. Thus, sales from the same economic unit to the favored customer and to the disfavored customer are compared to determine whether there has been a price discrimination. The requirement of two sales is satisfied. The *Danko* theory lacks this requirement. Under *Danko*, a sale from the parent corporation to the plaintiff is alleged as the disfavored sale. However, there is no sale to a favored customer for comparison and thus

no price discrimination may be shown. Transfers from a parent corporation to its wholly-owned subsidiary corporation are transfers within the same economic unit. These transfers are the economic equivalent of intra-company transfers of goods. As such, these transfers cannot be considered sales for Robinson-Patman Act purposes. *See generally* authorities cited in note 1, *supra*. *See also generally Von Kalinowski, Antitrust Laws & Trade Regulation* § 24.03[2] (1975).

[3] The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intra-corporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the *Danko* theory couched in terms of "control" and "arm's length dealings." Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. There is nothing in this record to suggest that disregarding the separate corporate entities will enable Gates and National to circumvent the Robinson-Patman Act. *See generally Brown v. Hansen Publications*, 556 F.2d 969, 972 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 448 F.2d 972, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-76 n.17 (N.D.Ohio1976); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 123 (E.D.N.Y.1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724, 731 (S.D.Ill. 1976). In this manner underlying substance controls surface form in economic and antitrust importance. In form, Gates sought to raise a corporate veil between its manufacturing and sales efforts by conducting its own retail operations through a separate corporate entity. There being no other owner of National besides Gates, the substance of this marketing technique was simply that a single economic unit manufactured and marketed its product. Therefore, we hold that a parent corporation's transfers to its wholly-owned subsidiary may not be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Since National was the only customer of Gates alleged to have been favored and since there was neither any further allegation nor proof of any other beneficiary of Gates' alleged discrimination, Plaintiffs have failed to establish the requisite favored sale for a Robinson-Patman Act suit.[3]

III.

The remaining issues Gates raises need not long detain us. First, we are not persuaded by Gates' efforts to upset the breach of contract recovery. Second, we do not believe that the District Court abused its discretion in deny-

---

3. Pragmatically our rejection or acceptance of the *Danko* theory would not change the fate of Plaintiffs' appeal. Even under the theory we reject, the separateness of parent and wholly-owned subsidiary must be established in order for a transfer between them to be considered a favored sale. There must be some showing of a lack of control by the parent and arm's length dealings between parent and subsidiary. *See* authorities cited note 1, *supra*. The Plaintiffs here depend on little else but the appearances of independence incident to Gates' and National's separate corporate status. Gates exercised full dominion and control over National; there was no arm's length dealings between them. Thus, on this record we would reverse even under the *Danko* theory had we found the theory itself persuasive. *See Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (appellate standard for review of jury verdict).

Those who suffer real antitrust damage are not necessarily left without any antitrust remedy either under our own analysis or under an unsuccessful attempt to recover on the *Danko* theory we reject. *See, e. g., Schaben v. Samuel Moore and Company*, 462 F.Supp. 1321, 1332 (S.D.Iowa 1973); *Reines Distributors, Inc. v. Admiral Corp.*, 256 F.Supp. 581, 586 (S.D.N.Y.1966).

ing Gates prejudgment interest in No. W-74-CA-41. Third, given our reversal of the Robinson-Patman Act claim, we deem it appropriate to remand for a reassessment of the issue of costs before the District Court in No. W-74-CA-41; costs on this appeal are awarded to Gates as the prevailing party. Fourth, we find no error in the District Court's failure to award Gates attorneys' fees in No. W-74-CA-41. Finally, we reject Gates' claim that it was entitled, as a matter of right, to two separate judgments here.

IV.

In summary, in No. W-74-CA-9, the Robinson-Patman Act claim is reversed, the breach of contract claim is affirmed; in No. W-74-CA-41 we affirm except we remand for reassessment of the issue of costs before the District Court.

REVERSED in part; AFFIRMED in part; and REMANDED.

Supreme Court, U. S.
FILED
OCT 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE AND RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

v.

THE GATES RUBBER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BICKEL AND CASE
THOMAS L. CASE
5441 First International Bldg.
Dallas, Texas 75270
Counsel for Respondent

TABLE OF CONTENTS

	Page
Opinion Below	1
Question Presented	1
Statement of the Case	2
Argument	4
Conclusion	12
Proof of Service	12

LIST OF AUTHORITIES

	Page
Boeing v. Shipman, 411 F.2d 365 (5th Cir., 1969)	8
Brewer v. Uniroyal, 498 F.2d 973 (6th Cir., 1974)	5,6
Brown v. Hansen Publications, Inc., 556 F.2d 969 (9th Cir., 1977)	6
Danko v. Shell Oil Co., 115 F.Supp. 886 (E.D.N.Y. 1953)	5,6,8,9,10,11
Mowery v. Standard Oil Co. of Ohio, 463 F.Supp. 762 (N.D. Ohio 1976) aff'd. 590 F.2d 335	5
Parrish v. Cox, 586 F.2d 9 (6th Cir., 1978)	5,6
Reines Distributors, Inc. v. Admiral Corporation, 241 F.Supp. 814, 256 F.Supp. 581, 257 F.Supp. 619 (S.D.N.Y. 1965)	6
Rudolph v. United States, 370 U.S. 269 (1962)	10
Schaben v. Samuel Moore and Co., 462 F.Supp. 1321 (S.D. Iowa 1978)	6
Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F.Supp. 724 (S.D. Ill. 1976)	6
SS Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959)	9
United States v. Sommerville, 324 F.2d 712 (3d Cir., 1963) cert. den. 376 U.S. 909	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE AND RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

v.

THE GATES RUBBER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 598 F.2d 962.

QUESTION PRESENTED

Petitioner ("Security"), Plaintiff in the trial court, here continues an effort, accepted by the District Court, but rejected by the Fifth Circuit, to constitute itself as an alleged disfavored customer in an alleged Robinson-Patman Act price

discrimination by trying to make a wholly-owned sales subsidiary ("National") of the Respondent ("Gates") the favored purchaser from Gates, when National exists on paper only (charter), 598 F.2d 962, 967 n.3, with the sole basis of the discrimination claim being that Gates did not sell tires to Security at its cost and at no profit (App. 300-301). The question presented to this Court is whether it will grant certiorari to review the Fifth Circuit decision when the Fifth Circuit held (1) that transfers from a parent corporation to its wholly-owned subsidiary corporation cannot be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit and (2) even if transfers from a parent corporation to its wholly-owned subsidiary corporation could be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit, Security failed to prove such a sale from Gates to National. 598 F.2d 962, 967 n.3.

STATEMENT OF THE CASE

Gates is in the rubber manufacturing business, and its product line included tires for motor vehicles. Gates completely ceased manufacturing tires by the Spring of 1974. Security was a private brand seller of tires, a private brand being a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. Security started business in 1964. From that time until the Fall of 1973 Security purchased most of its tires from Gates. 598 F.2d 962, 963.

During the period relevant to this lawsuit, 1969-1973, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc.. In effect, Gates marketed tires under the National label. Gates exercised full dominion and control over National, and National had no separate existence from Gates other than a corporate charter. 598 F.2d 962, 963, 967 n.3.

Security and Security-Texas, a sister corporation, instituted a lawsuit in the Western District of Texas against Gates on February 8, 1974. Among other things, the lawsuit included a treble damage action under the Robinson-Patman Act, alleging a secondary line discrimination. The theory and proof of Security's case assigned National the role of their competitor and the beneficiary of Gates' price discrimination — the so-called "favored customer". Security and Security-Texas sought to assign themselves the roles of the victims of Gates' price discrimination — the so-called "disfavored customers". There was neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination. 598 F.2d 962, 963-965. The Plaintiffs' sole Robinson-Patman complaint was that Gates would not sell tires to Plaintiffs at Gates' cost and at no profit. (App. 300-301).

Security won a jury verdict on the Robinson-Patman claim in the amount of One Hundred Thousand ($100,000.00) Dollars. The amount was trebled and, along with other claims not pertinent to the Petition for Certiorari, was reduced to judgment in the amount of Three Hundred Thousand ($300,000.00) Dollars. Gates perfected its appeal to the Fifth Circuit, which reversed the trial court's Robinson-Patman judgment. In doing so, the Fifth Circuit held that transfers from a parent corporation to its wholly-owned subsidiary corporation cannot be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit. However, the Fifth Circuit also held that, if transfers from a parent corporation to its wholly-owned subsidiary can be considered separate sales to a favored customer, then Security still completely failed to prove a sale from Gates to National.

ARGUMENT

At the outset, Gates would point out that Security's Petition for Certiorari appears frivolous. It is supported by little or no authority and is mainly rhetorical in nature, and raises matters not relevant to the Court's consideration, such as whether there may be a sale from a parent to a partially-owned subsidiary, and questions of jurisdiction, venue, income tax, franchise tax, creditors' rights, torts, contracts, agency, bailment and employers' liability. At the same time, it skirts and, seemingly, tries to avoid the Robinson-Patman issue. At best, the Petition for Certiorari raises matters of importance to the litigants only. As a matter of fact, the Fifth Circuit held that Security loses its Robinson-Patman case under the Fifth Circuit's theory and under Security's theory relating to sales from a parent to a wholly-owned subsidiary.

Laid to its barest bones, Security's sole complaint in its Petition for Certiorari is that Gates refused to sell to Security, tires at Gates' cost and at no profit. With this in mind, Gates will set forth the reasons why the Petition for Certiorari should not be granted.

Security's primary argument for granting certiorari is set out at pages six (6) and eight (8) of the Petition as follows:

> The question presented here is simply whether a sale by a manufacturer to its wholly-owned separate corporation subsidiary can be a sale to a favored customer of which the disfavored independent can complain. This is a profoundly important question of federal law which has not been, but should be, settled by this court.

* * *

> In one opinion, parent and subsidiary are said to be separate if they hold themselves out as being separate or if the parent does not control the subsidiary's pricing. In others, the control factor alone is treated as critical. None explain how the wholly-owned subsidiary can fail to be subject to the control of the parent. Only this case holds that there can never be a sale from parent to subsidiary.

Apparently, the basis for Security's argument for granting certiorari is a conflict among the Circuits. However, an examination of the Fifth Circuit's opinion in this cause, and those opinions of other Circuits touching upon the question, shows that there is no such conflict.

The Fifth Circuit commences its opinion with the rejection of *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953). As the Fifth Circuit pointed out, the District Court in that case, in *obiter dictum*, unwittingly created antitrust theory, to wit: that under some possible circumstances a transfer from a parent corporation to a wholly-owned subsidiary corporation may constitute a sale for Robinson-Patman purposes. Subsequent cases (found in the Fifth Circuit's first footnote in its opinion) have given some lip service to this theory, or, as the Fifth Circuit stated, they repeat "encysted *obiter dictum.*" 598 F.2d 962, 966.

However, the Fifth Circuit correctly states that there is no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the *Danko* theory. Cases which have subsequently cited the *Danko* theory usually cite the case for the general proposition that, under some possible set of circumstances, a transfer between a parent corporation and a wholly-owned subsidiary may constitute a sale within the meaning of the Robinson-Patman Act. *Brewer v. Uniroyal*, 498 F.2d 973, 977 n.2 (6th Cir. 1974) (dicta); *Parrish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978); *Mowery v. Standard Oil Co. of Ohio*,

463 F.Supp. 762 (N.D. Ohio 1976) (dicta) aff'd. 590 F.2d 335 (no opinion); *Schaben v. Samuel Moore and Co.*, 462 F.Supp. 1321 (S.D. Iowa 1978); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724 (S.D. Ill. 1976); and *Reines Distributors, Inc. v. Admiral Corporation*, 241 F.Supp. 814, 256 F.Supp. 581, 257 F.Supp. 619 (S.D.N.Y. 1965). None of the courts in the foregoing cases awarded Robinson-Patman damages on the *Danko* theory. Thus, it would seem that the authorities giving lip service to *Danko*, in fact, reject it by refusal to sustain a damage award on such theory.

As to a conflict between the Circuits, the Court in *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974), expressly did not reach the question of whether or not there can be a Robinson-Patman sale from a parent to a subsidiary. The Court in *Parrish v. Cox*, 586 F.2d 9 (6th Cir. 1978) made a statement, in passing, that the Plaintiff contended that a sale between a parent corporation and a wholly-owned subsidiary "may" constitute a sale within the meaning of the Robinson-Patman Act. The Court did rule that the Defendant exercised such control over the company-owned stations that there could not be any sales between the parent and such stations. Its holding went no farther, and it reiterated the antitrust rule that substance controls over form.

The only other Circuit Court of Appeals to pass on the question of whether or not a transfer from a parent to a subsidiary may be a sale under the Robinson-Patman Act is the Ninth Circuit in *Brown v. Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir.1977). An examination of that case shows that it is in accord with the Fifth Circuit's opinion in this case. It stated as follows:

> Appellants argued that control by one corporation of another corporation's pricing policies is the principal factor

> determining whether the corporations are to be treated as separate entities for the purposes of the Robinson-Patman Act. This may be true when the question is whether related corporations selling in the same market are to be treated as a single trader for the purpose of comparing their respective selling prices under Robinson-Patman Act strictures.
>
> * * *
>
> The record reveals that Hansen Publications and Music Retailers are part of a single integrated enterprise, and that transfers between them were indistinguishable from dealings within the same corporate entity. *Id.*, at 971-972.

The holding of the Fifth Circuit in the present case is the same as that of the Ninth Circuit:

> The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intra-corporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the *Danko* theory couched in terms of 'control' and 'arm's-length dealing.' Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. 598 F.2d 962, 967.

In summation, there is not a conflict amongst the Circuit Courts of Appeals so as to require this Court to grant the Petition for Certiorari. First, the Sixth Circuit has not held that there may be, under some circumstances, a transfer from a

parent corporation to a subsidiary so as to constitute a Robinson-Patman Act sale. Second, the Ninth Circuit is in accord with the Fifth Circuit's opinion. Moreover, and irrespective of the foregoing, all the cases that have touched upon the question have refused to award Robinson-Patman Act damages on the theory advanced in *Danko v. Shell Oil Co.*, 115 F.Supp. 886 (E.D.N.Y. 1953). Thus, by refusing to find liability under the *Danko* theory, the cases which have discussed such theory are actually in accord with the Fifth Circuit — that is, under economic substance and reality (and not form), there is no dealing between a parent and wholly-owned subsidiary, so as to constitute a sale for Robinson-Patman purposes. They are one economic unit, and the courts that have discussed the *Danko* theory recognized the fact that they are but one economic unit by refusing to award damages.

Moreover, even if there were a conflict between the Circuits on the question of whether or not there may be a sale from a parent corporation to a wholly-owned subsidiary corporation for the purposes of the Robinson-Patman Act, this is not a case in which the Court should grant the Petition for Certiorari. As the Fifth Circuit noted at 598 F.2d 962, 967, n.3, a review of the record under the *Danko* theory would not change the fate of the Plaintiff's appeal, inasmuch as Gates exercised full dominion and control over National, and there was no arm's length dealing between the two of them. Basically, the Court found that there was insufficient evidence to support the jury verdict under the standard of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (appellate standard for review of jury verdict). Thus, assuming, for purposes of argument, that a conflict exists among the Circuits, Security would lose its case under either theory.

An examination of the case of *United States v. Sommerville*, 324 F.2d 712 (3rd Cir. 1963) cert. den. 376 U.S. 909 is instructive. The majority opinion and the concurring opinion in

that case reveal that there was a conflict among the Circuits as to whether Federal or State law controlled the determination of the type of liability in question. However, resolution of the conflict by this Court could not have changed the result in the court below, inasmuch as the petitioner in that case would be liable under either Federal law or State law. That is, under either theory, the petitioner's liability was the same. The same is true with Security's fate in this matter. Under either theory, it loses its Robinson-Patman Act claim. Therefore, review of the Fifth Circuit's opinion by this Court would be of little importance to anyone other than the litigants themselves, and the outcome would be the same under the *Danko* theory or the Fifth Circuit's theory.

In this connection, this Court has heretofore stated as follows:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. *SS. Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

It is submitted that Security's Petition is not presented in the context of meaningful litigation, inasmuch as a reversal of the Fifth Circuit's opinion and an affirmation of the *Danko* theory by this Court could not change Security's fate.

Additionally, an examination of Security's Petition for Certiorari shows that it is asking this Court to reject the theory of the Fifth Circuit, to adopt the *Danko* theory and, finally, to examine the record under the *Danko* theory to ascertain whether or not the proof was legally sufficient to sustain the jury's verdict on its Robinson-Patman Act claim. Security's Statement in its Petition for Certiorari is nothing more or less than a rehash of the evidence that Security believes to support the jury verdict. Thus, Security's goal and objective in this cause is review of a

factual matter, which would be of no importance, save to the litigants themselves; and under such circumstances, the Petition for Certiorari should be denied. *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

In summation, there is not a conflict between the Circuits on the question of whether or not there may be a Robinson-Patman sale from a parent to a wholly-owned subsidiary. Even the Courts which have given some lip service to the *Danko* theory have refused to impose Robinson-Patman damages upon a defendant under such theory. Such refusal is tantamount to a rejection of the *Danko* theory. 598 F.2d 962, 966. Thus, the cases which talk in terms of *Danko*, but refuse to find liability in terms of *Danko*, recognize the economic fact that transfers from a parent corporation to its wholly-owned subsidiary are transfers within the same economic unit, and are the equivalent of intra-company transfers of goods.

Moreover, not only is *Danko* inconsistent with economic reality, but it is also inconsistent with other Robinson-Patman antitrust theory which recognizes a parent and subsidiary as a single economic unit so as to attribute the pricing practices of the subsidiary to the parent. *See* 598 F.2d 962, 966.

Second, even if there were conflict among the Circuits, the outcome of this appeal could not change Security's position or fate, thus, making this appeal important to the litigants only and not to the public.

Next, Security infers that the opinion of the Fifth Circuit will have an enormous effect upon the day-to-day commercial life of this country. This is simply not so. Security concedes in its Petition (page eight), that the Fifth Circuit opinion cites almost all the cases involving the question of a sale from a parent to a subsidiary. An examination of the Fifth Circuit's opinion would

reveal that this particular question has been reported, at the most, ten times since the inception of the Robinson-Patman Act, 598 F.2d 962, 966 n.1, and there is no reported opinion which imposes liability under the *Danko* theory, which was based on *obiter dictum* from the outset.

Finally, Security alleged National, and National only, as the favored customer of Gates. There was no further allegation or proof of any other beneficiary of Gates' alleged discrimination. Security's suit itself ignored economic reality because it charged, as Gates' sole discrimination, Gates' refusal to sell to Security at Gates' cost and at no profit. Presumptively, Security would have sued Gates for price discrimination for any discriminatory sales to other private brand sellers of tires, if in fact there had been any price discrimination. Rather, Security, for whatever reason, decided not to pursue such an approach. Instead, it decided to attack a paper transfer of goods between a parent and a wholly-owned marketing subsidiary, which such subsidiary had no existence other than its corporate charter. Thus, the Petition for Certiorari presents no question of public importance because Security does not bring with it any proof of two sales, thereby precluding the possibility of anticompetitive price discrimination proscribed by the Robinson-Patman Act.

CONCLUSION

Petitioner has shown nothing, and there is nothing, which would merit review of the judgment of the Fifth Circuit Court of Appeals by this Court.

Respectfully submitted,

BICKEL AND CASE
THOMAS L. CASE
5441 First International Bldg.
Dallas, Texas 75270

Counsel for Respondent

PROOF OF SERVICE

I, Thomas L. Case, one of the counsel for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of October, 1979, I served a copy of the foregoing Respondent's Brief in Opposition by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Mr. David B. Kultgen, P.O. Box 529, Waco, Texas 76703.

THOMAS L. CASE